A CONVENTION TO AMEND THE CONSTITUTION —WHY NEEDED—HOW IT MAY BE OBTAINED

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A LARGE majority of the people of the country are in favor of the election of United States Senators by direct vote. That this is a fact probably few will question. For years the question of direct election of Senators has been debated and the arguments pro and con advanced. But a large proportion of the public have now reached the conclusion that their election by direct vote will result in closer relations between the great body of people and their representatives in Congress and will tend to promote better government. This conviction has undoubtedly been brought about largely by the many and frequently disgraceful abuses which have resulted under the present system of choosing Senators. Many persons feel also that the members of the State Legislature should be chosen rather for their individual merit than for their party affiliations—that opinions on national issues have little to do with the desirability of candidates for a legislative body which has to pass on matters of local legislation. Under present conditions, however, most men feel the necessity of voting for their party candidate for the Legislature, even though they do not consider him the best qualified for the place, when he may have the choosing of a United States Senator. Hence the feeling that the popular election of Senators will tend to a higher standard in local legislation. At the time of the adoption of the Constitution, the Senators were considered as representatives of the States as separate entities. This had much to do with the manner provided in the Constitution for their election. When the Constitution was adopted we were a confederation of separate States. To-day we are a nation. We have reached a grander conception of our nationality. To-day the State and national Govern-

ment are mere agencies to conduct the business of the real sovereign—the people of the United States.

But the question that is now of paramount importance is: How is this change to be brought about? It requires, of course, an amendment to the Federal Constitution. Many States are attempting to reach the practical result by advisory popular votes more or less binding upon the Legislature. But this is a mere makeshift; better, perhaps, than the old state of things, but at most only a temporary expedient. The Constitution must be amended. There are two means by which amendments may be proposed. One is for Congress to submit a proposed amendment to the States for ratification. The other is for a constitutional convention to submit proposed amendments for similar ratification. Four times, twice without a dissenting vote, has the House of Representatives passed a resolution submitting an amendment providing for the popular election of Senators. Not one of these resolutions has passed the Senate. *Not one has even been allowed to come to a vote in that body.* It does not seem very probable that popular election of Senators will be secured in this way. But, as just stated, there is another means provided for securing amendments to the Constitution. Article V of that instrument provides:

"Section 1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; *provided* that no amendment which may be made prior to the year one thousand eight hundred and eight shall, in any manner, affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

There are now forty-six States in the Union. Two-thirds of that number is thirty and two-thirds, or thirty-one applications required before Congress is obliged to call a constitutional convention. *The fact about to be stated may not be generally known, but it is a fact, nevertheless; the Legislatures of twenty-eight States have already formally applied to Congress to call such a convention.* The following are the States whose Legislatures have made such applications:

Arkansas 1903	Missouri 1907
California 1903	Montana 1907
Colorado 1901	Nebraska 1903
Delaware 1907	Nevada 1907
Idaho 1908	New Jersey 1907
Illinois 1903–1909	North Carolina 1907
Indiana 1907	Oklahoma 1908
Iowa 1907–1909	Oregon 1901–1909
Kansas 1907	Pennsylvania 1901
Kentucky 1902	South Dakota 1908
Louisiana 1907	Tennessee 1901–1905
Michigan 1901	Texas 1899–1901–1908
Minnesota 1901	Utah 1908
Wisconsin 1908	Washington 1903

In other words, but three more such applications are required to impose upon Congress the duty of calling a constitutional convention. Should Arizona and New Mexico be admitted before this number of applications are made, there will be forty-eight States in the Union, or thirty-two such applications required. The text of these resolutions may be of interest. The following are typical:

LOUISIANA

"Whereas we believe that Senators of the United States should be elected directly by the voters; and

"Whereas to authorize such direct election an amendment to the Constitution of the United States is necessary; and

"Whereas the failure of Congress to submit such amendment to the States has made it clear that the only practicable method of securing a submission of such amendment to the State is through a constitutional convention, to be called by Congress upon the application of the Legislatures of two-thirds of all the States: Therefore be it

"*Resolved by the general assembly of the State of Louisiana,* That the Legislature of the State of Louisiana hereby makes application to the Congress of the United States, under Article V of the Constitution of the United States, to call a constitutional convention for proposing amendments to the Constitution of the United States.

"Sec. 2. That this resolution, duly authenticated, shall be delivered forthwith to the President of the Senate and Speaker of the House of Representatives of the United States, with the request that the same shall be laid before the said Senate and House."

KANSAS

"Whereas there is a wide-spread and rapidly growing belief that the Constitution of the United States should be so amended as to provide for the election of the United States Senators by the direct vote of the people of the respective States; and

"Whereas other amendments to the United States Constitution are by many intelligent persons considered desirable and necessary; and

"Whereas the Senate of the United States has so far neglected to take

any action whatever upon the matter of changing the manner of electing United States Senators, although favorable action upon such proposed change has several times been unanimously taken by the House of Representatives: Therefore be it

"*Resolved* by the House of Representatives of the State of Kansas (the Senate concurring therein), That the Legislature of Kansas, in accordance with the provisions of Article V of the Constitution of the United States, hereby apply to and request the Congress of the United States to call a convention for the purpose of proposing amendments to the Constitution of the United States."

PENNSYLVANIA

"Whereas a large number of State Legislatures have at various times adopted memorials and resolutions in favor of election of United States Senators by popular vote; and

"Whereas the national House of Representatives has on four separate occasions, within recent years, adopted resolutions in favor of this proposed change in the method of electing United States Senators, which were not adopted by the Senate; and

"Whereas Article V of the Constitution of the United States provides that Congress, on the application of the Legislatures of two-thirds of the several States, call a convention for proposing amendments, and believing there is a general desire upon the part of the citizens of the State of Pennsylvania that the United States Senators should be elected by a direct vote of the people: Therefore be it

"*Resolved* (if the House of Representatives concur), That the Legislature of the State of Pennsylvania favors the adoption of an amendment to the Constitution which shall provide for the election of United States Senators by popular vote, and joins with other States of the Union in respectfully requesting that a convention be called for the purpose of proposing an amendment to the Constitution of the United States as provided for in Article V of the said Constitution, which amendment shall provide for a change in the present method of electing United States Senators so that they can be chosen in each State by a direct vote of the people."

WISCONSIN

"Whereas Article V of the Constitution of the United States provides that 'the Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the Legislatures of three-fourths of the several States or by convention in three-fourths thereof,' etc.; and

"Whereas the House of Representatives of the Congress of the United States has on four separate occasions passed by a two-thirds vote a resolution proposing an amendment to the Constitution providing for the election of United States Senators by direct vote of the people; and

"Whereas the United States Senate has each time refused to consider or vote upon said resolution, thereby denying to the people of the several States a chance to secure this much-desired change in the method of electing Senators; therefore be it

"*Resolved* by the Senate and Assembly of the State of Wisconsin, That, under the authority of Article V of the Constitution of the United States, application is hereby made to Congress to forthwith call a constitutional convention for the purpose of submitting to the States for ratification an amendment to the Federal Constitution providing for the election of United States Senators by direct vote of the people."

All of the resolutions except that passed by the Legislature of Delaware referred principally to the matter of an amendment to provide for popular election of Senators. In the resolution passed by the Legislature of Delaware, the matter apparently moving that body was the desire to secure an amendment to prevent polygamy. The resolution, however, formally applies to Congress to call a constitutional convention.

In addition to the States above enumerated, the Legislatures of Wyoming and Alabama have declared themselves in favor of the proposed amendment in resolutions to Congress, although the somewhat unhappy wording of their resolutions probably prevents them from being operative as formal applications for such a convention.

In 1895 the Legislature of Wyoming passed and submitted to Congress a resolution or memorial reciting that the exciting and disturbing contest for seats in the Legislature in many of the States has been owing in great measure to impending contests for United States Senators; that in many States the sessions of the Legislature are limited to a specified time, and much of this time has been wasted and consumed in a fruitless effort to elect Senators, and providing further:

"The temptation to corruption and the inducements to influence legislators by questionable means would be entirely removed if the election of Senators were transferred to the people. It is believed the business of the Legislature should be confined to matters of legislation, and that the excitement attendant upon the selection of United States Senators by the Legislature interferes to a great degree with that business. The growth of a public sentiment in this direction we believe to be grounded upon good reasons, calling for an amendment of the Constitution in this respect,"

and urging Congress to submit a constitutional amendment to provide for popular election.

In 1910 the Legislature of Alabama passed and submitted to Congress a resolution providing in part:

"Whereas, Article V of the Constitution of the United States provides that whenever two-thirds of both Houses (of Congress) shall deem it necessary shall propose amendments to the Constitution, or, on application of the Legislatures of two-thirds of the several States, shall call a convention

for proposing amendments, which in either case shall be valid to all intents and purposes:

"And whereas the Legislatures of twenty-seven States have applied to the Congress of the United States for the submission to the States of an amendment to the Constitution providing for the election of United States Senators by direct vote of the people"

and petitioning Congress to submit an amendment providing for direct election of Senators.

While these resolutions clearly indicate the sentiment of these Legislatures, they can hardly be held, as above stated, to constitute such formal application for a convention as is required by the Constitution. It is entirely competent, however, for the Legislatures of these States to adopt resolutions hereafter formally requesting Congress to call such a convention.

But in view of the action of the Senate, as heretofore noted, on the proposition to submit an amendment directly, some may question whether it will concur in issuing a call for a constitutional convention even though two-thirds of the State Legislatures formally apply therefor. But when that number of States apply, Congress has, under the Constitution, absolutely no discretion. This will be more fully considered hereafter. It would hardly seem, therefore, that the Senate would wilfully violate the Constitution which every member is sworn to uphold. But assuming that it should do so—is there any remedy? In that event, it is believed Congress can be directly compelled to issue the call. At first blush this proposition may seem extremely radical and perhaps decidedly visionary. But it may not be so.

Let it first be clearly appreciated that, under the Constitution, Congress has no discretion in the matter of calling a convention when the Legislatures of two-thirds of the States have applied therefor. In that event, the Constitution provides that Congress "shall" call a convention. The word "shall," as there used, is equivalent to the word "must." The framers of the Constitution evidently adopted this provision advisedly and with this intention. By the first part of the provision Congress is authorized to propose amendments in its discretion. But this alone would obviously leave it within the power of Congress to forever prevent any amendment. A further means of proposing amendment was, therefore, provided with which Congress was to have no discretion. In other words, when the requisite number of applications are made, the Constitution

makes it the *positive duty* of Congress to call the convention regardless of whether that body considers it advisable or not. This is the express language of the Constitution, and the Constitution is "the supreme law of the land." (Article VI, Sec. 2.) The idea thus expressed is exactly the idea that the framers of the instrument intended it to express. That there may be no doubt on this fundamental proposition, let us present the direct proof. The following, taken from Elliott's "Debates of the Constitutional Convention of 1787," is believed to be all that appears upon this particular matter and conclusively establishes the proposition just asserted:

"*Tuesday, May 29*

"(P. 126) Mr. Randolph then opened the main business (of the convention):

". . . He observed that, in revising the Federal system, we ought to inquire, first, into the properties which such a Government ought to possess; secondly, the defects of the Confederation; thirdly, the dangers of our situation; and, fourthly, the remedy. . . . He proposed, as conformable to his ideas, the following resolutions, which he explained one by one. . . .

"(P. 128) '13. Resolved, that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the national Legislature ought not to be required thereto.'

"Mr. Charles Pickney laid before the House the draft of a Federal Government which he had prepared, to be agreed upon between the free and independent States of America; . . .

"(P. 132) Art. XVI. If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution."

"*Tuesday, June 5*

"(P. 157) The thirteenth resolution [of Mr. Randolph] to the effect *that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the national Legislature,* being taken up:

"Mr. Pickney doubted the propriety or necessity of it.

"Mr. Gerry favored it. The novelty and difficulty of the experiment requires periodical revision. The prospect of such revision would also give immediate stability to the Government. Nothing has yet happened in the States where this provision existed to prove its impropriety. The proposition was postponed for future consideration."

"*Monday, June 11*

"(P. 182) The thirteenth resolution for amending the national Con-

stitution hereafter, without consent of the national Legislature being considered, several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national Legislature unnecessary.

"Colonel Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular and constitutional way than to trust to chance and violence. It would be improper to require the consent of the national Legislature, because they may abuse their power and refuse their consent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

"Mr. Randolph enforced these arguments. The words 'without requiring the consent of the national Legislature' were postponed. The other provision in the clause passed *nem. con.*"

"*Monday, August 6*

"(P. 376) Mr. Rutledge delivered in the report of the committee of detail as follows, a printed copy being at the same time furnished to each member: . . .

"(P. 381) 'Art. XIX. On the application of the Legislatures of two-thirds of the States in the Union for an amendment of this Constitution, the Legislature of the United States shall call a convention for that purpose.'"

"*Thursday, August 30*

"(P. 498) Article XIX [above] was taken up.

"Mr. Gouverneur Morris suggested that the Legislature should be left at liberty to propose amendments whenever they pleased.

"*The article was agreed to,** nem. con."

"*Monday, September 10*

"P. 530) Mr. Gerry moved to reconsider Article XIX, viz.: [quoting].

"This Constitution, he said, is to be paramount to the State Constitution. It follows, hence, from this Article that two-thirds of the States may obtain a convention, a majority of which can bind the Union to innovations that may subvert the State Constitution altogether. He asked whether this was a situation proper to be run into.

"(P. 531) Mr. Hamilton seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil to subject the people of the United States to the major voice than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State Legislatures will not apply for alterations, but with a view to increase their own powers. The national Legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought *also*†

* Italics author's.

† Italics author's.

to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

"Mr. Madison remarked on the vagueness of the terms, 'Call a convention for the purpose,' as sufficient reason for reconsidering the Article. How was a convention to be formed? By what rule decide? What the force of its acts?

"[Motion to reconsider carried.]

"Mr. Sherman moved to add to the Article 'or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States.'

"Mr. Gerry seconded the motion.

"Mr. Wilson moved to insert 'two-thirds of' before the words 'several States.'

"[Motion lost.]

"Mr. Wilson then moved to insert 'three-fourths of' before 'the several States,' which was agreed to *nem. con.*

"Mr. Madison moved to postpone the consideration of the amended proposition in order to take up the following:

"'The Legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the Legislatures of the several States or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States.'

"(P. 532) Mr. Hamilton seconded the motion.

"[The clause preventing amendments affecting slavery prior to 1808 added.]

"On the proposition of Mr. Madison and Mr. Hamilton [carried]."

"Saturday, September 15

"Article V [just quoted].

"(P. 551) Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States; as abolishing them altogether or depriving them of their equality in the Senate. . . .

"Colonel Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people if the Government should become oppressive, as he verily believed would be the case.

"Mr. Gouverneur Morris and Mr. Terry moved to amend the Article so as to *require** a convention on application of two-thirds of the States.

"Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided.

* Italics are author's.

"The motion of Mr. Gouverneur Morris and Mr. Gerry was agreed to, *nem. con.* . . .

"(P. 552) Mr. Gouverneur Morris moved to annex a further proviso—'that no State, without its consent, shall be deprived of its equal suffrage in the Senate.'

"This motion, being dictated by the circulating murmurs of the small States, was agreed to without debate, no one opposing it or on the question saying no. . . .

"The Constitution was then ordered engrossed, and the House adjourned."

"*Monday, September 17*

"(P. 553) The engrossed Constitution being read . . . the members then proceeded to sign the Constitution, as finally amended, as follows: . . .

"Article V [as quoted in the beginning of this discussion]."

It appears, therefore, that it was the express will of the convention that there should be a means of amending the Constitution without the consent of Congress; that pursuant to this idea the provision as originally adopted by the convention gave Congress no discretion whatever in regard to amendments, and the provision giving Congress power to propose amendments directly was a later addition and was intended simply to provide an additional and more speedy method of proposing amendments, but that throughout it was intended that when two-thirds of the States applied for a constitutional convention it should become the unqualified duty of Congress to issue a call.

Hence it is submitted that when the specified conditions have been performed, it becomes the absolute duty of Congress, under the Constitution, to call a convention, regardless of its ideas as to the necessity or propriety thereof. It is clear that a failure to act is equivalent to a refusal to perform this duty. The immediate question, therefore, is: Should Congress refuse to perform this duty, is there any method, under the Constitution, of compelling it to call a convention? If there is not, then the intention of those who framed and adopted the Constitution, and the express mandate of that instrument, are nullified, for it still rests with Congress absolutely to prohibit any amendments; if there is not, *then there exists in this nation and under our Constitution a body that is above the law, above even the Constitution.*

If the power to compel this action exists at all, clearly it must rest with the judiciary. The question, then, is reduced to this: Should Congress refuse to perform this duty, has the judicial department of the Government the au-

thority, under the Constitution, to compel it to do so? The negative of this proposition will undoubtedly be urged on the ground that the three branches of the Government—executive, legislative and judicial—are co-ordinate and co-equal and each supreme within its sphere, and therefore that the judicial department has no authority or jurisdiction over the legislative to compel it to perform any act. That the three departments are co-ordinate and co-equal and each supreme within its sphere is unquestionably one of the fundamental principles on which our plan of Government is based. Under this principle, when Congress is engaged in legislative business, it is clear beyond the possibility of dispute that no other department of the Government has any authority to determine its action. Equally, when the executive branch of the Government is engaged in performing its executive functions, no other department has any authority over it. But this is because the matter of determining, in such cases, what action shall be taken is delegated by the Constitution to the discretion of that branch of the Government. So long, therefore, as Congress is acting in a legislative capacity,—that is, in all cases where the Constitution has vested in it the discretion to determine whether any action at all, or what action, shall be taken,—the judiciary has no authority over it. But it is equally beyond dispute (and this is the proposition of the greatest importance that is sometimes overlooked) that the supremacy of the several departments is *under the Constitution;* it arises out of, depends upon and is subservient to the Constitution. In calling a convention when the Legislatures of two-thirds of the States have applied therefor, it has been shown that, under the Constitution, Congress has no discretion. In this one instance, which is perhaps the only one, *Congress acts not in a legislative, but in a purely ministerial capacity.* Whether an act is legislative or ministerial depends not upon the person appointed to perform it, but on the nature of the act itself; and, as has been shown, in this case Congress is simply the agent appointed and commanded by the Constitution to perform a specific act when certain specific conditions have been fulfilled. That Congress is commanded to do the act, regardless of its discretion, demonstrates beyond the necessity of argument that it is a ministerial duty. Had that office been created by the Constitution, it might equally well

have been provided that upon the performance of the specified conditions the Secretary of State should issue the call. Had this been done, it is believed no one would seriously question that the act would be purely ministerial and that the courts might compel its performance. The nature of the act remains the same, whomsoever is appointed to perform it; being ministerial in its nature, it remains ministerial, though Congress is the agent appointed by the Constitution to carry it into execution.

Where the law imposes a specific duty upon a person or a body, it is pre-eminently within the jurisdiction and the duty of the judiciary to enforce it. This is one of the chief, if not indeed the primary, object for which courts are created. In enforcing the performance of such a duty, then, the judiciary is not invading or infringing upon the province of any other department of the Government. On the contrary, it is simply performing the functions and fulfiling the obligations imposed on it by the Constitution. Thus in the celebrated case of Marbury *vs.* Madison (1, Cranch, 137), decided by the Supreme Court of the United States in 1803, the opinion being delivered by Chief-Justice Marshall, it was held that the judiciary has the authority, under the Constitution, to compel the executive department to perform ministerial acts commanded by law. That case established the rule that, notwithstanding the principle that the various departments of the Government are co-equal and each supreme within its sphere, the judicial department has the authority and the duty, under the Constitution, to compel the executive to perform acts commanded by law in regard to which no discretion is left to the executive.* This principle has been reaffirmed and enforced both in the Federal and State courts times almost without number and no principle of constitutional law is more thoroughly settled. It was clearly stated by Mr. Justice Bradley in Board of Liquidation *vs.* McComb, 92, U. S., 531, 541, as follows:

"But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance."†

* See also the strong opinion delivered by Mr. Justice Thompson in the almost equally celebrated case of Kendall *vs.* U. S., 12 Peters, 524.

† See also Garfield *vs.* Goldsby, 211 U. S., 249, 261; Noble *vs.* Union River Logging R. R., 147 U. S., 165, 171, collecting numerous authorities to the same effect.

It may be taken as established, then, that the judicial department has the authority, under the Constitution, to compel the executive to perform a ministerial act, and this does not infringe upon the independent supremacy of that department of the Government within its sphere. It is believed that it has been proved that the act of calling a convention, under the provision of the Constitution heretofore quoted, is a purely ministerial act. Upon what principle, then, can it be maintained that the judicial department is without authority to compel the performance thereof? Is the executive liable to be compelled to obey the law and yet the legislative department free to disobey even the Constitution? The very proposition first urged against the authority of the court, that the several branches of the Government are co-equal, would seem to demonstrate that the legislative branch cannot claim such an exemption to which the executive is not entitled.

The right to compel performance of the constitutional mandate is simply the converse of the principle which is thoroughly established, that it is the function and duty of the judiciary to *nullify* any act of Congress which is in conflict with the Constitution. It no more infringes upon the principle of the independence and separate functions of the three branches of the Government to compel Congress to perform an act which the Constitution positively commands than to nullify an act of that body which it prohibits. Both rest upon the same principle, that the supremacy of Congress within its sphere is *under*, and not independent of, the Constitution.

It is submitted, therefore, that the act of calling the convention being purely ministerial and commanded by the Constitution, the judicial department of the Government has the authority and jurisdiction, under the Constitution, to compel Congress to perform it; and this in no wise violates the principle that the three departments of the Government are co-ordinate and co-equal and each supreme within its sphere.* As heretofore noted, this is probably the

* In this connection the case of State *ex rel.* Benton vs. Elder, 31 Neb., 169, is of interest. Respondent Elder was the Speaker of the Nebraska House of Representatives. The Constitution of that State required him to open and publish at a specified time and place the returns of the election for officers of the executive department of the State Government. The relator Benton brought this proceeding in the Supreme Court, praying for a writ of mandamus to compel Elder as Speaker of the House to

only case in which Congress, as a body, acts in a ministerial capacity and hence the only one in which the courts would have this power over it.†

The authority or jurisdiction of the judicial department to make an order must not be confused with its physical ability to compel obedience thereto. Were it to come to a question of comparative physical strength between the judiciary and the executive, for instance, the latter, with the Army and Navy behind it, would, of course, be vastly superior. That fact, however, does not impair the constitutional authority of the former to make an order commanding the executive to perform an act which the law requires him to do. So, if it came to a matter of comparative physical strength, Congress might be able to summon more force than the courts, but the latter's authority, under the Constitution, depends on no such consideration. The Government is a unit. It is composed of co-ordinate branches working together under the same supreme law, not of separate antagonistic bodies. Every officer, of whatever branch, is sworn to support and obey the Constitution, and it is the natural presumption, fully justified by our history, that none will refuse to obey its mandates as interpreted by that body whose function and duty it is to do so.

The form of remedy for compelling Congress to act would seem clearly to be a writ of mandamus. It is believed that

perform this duty, alleging that he had refused to do so. Elder answered, setting up that as Speaker and presiding officer of the House of Representatives he represented an independent and co-ordinate branch of the Government and that the court had no jurisdiction over his acts. This contention, however, the court overruled, holding that inasmuch as the Constitution imposed upon him a specific duty in regard to which he was left no discretion, he could not refuse to perform it, and that, although a legislative officer, it was as much the duty of the courts to compel him to perform the ministerial act as to compel any other officer or person to perform a similar act.

The case of Valley Paper Company *vs.* Smoot, *et al.*, decided by the court of the District of Columbia in February last, is also interesting in this connection. In that case it was held that the courts have the jurisdiction to compel the Congressional committee to perform a duty imposed upon it by law and in regard to which it is left no discretion.

Cf. also Attorney-General *vs.* Taggart, 66 N. H., 362, in which it was held that the court had jurisdiction to compel the Lieutenant-Governor to perform the duties of Governor in the incapacity of the Governor, that duty being required by law.

† In this connection, however, see the Twelfth Amendment to the Constitution, which may impose a further ministerial duty upon Congress. In determining this question the case of State *ex rel.* Benton, 31 Neb., 169, cited in the preceding note, is important.

such a proceeding may be instituted by any citizen. Every citizen of the country has a direct interest that the Constitution shall be obeyed, and that interest is none the less real and entitled to recognition and protection by the courts that it is not capable of financial computation. Indeed, the very fact that he has no other remedy serves rather, under the established principles governing its issuance, to emphasize his right to this writ. Since the Constitution does not confer original jurisdiction upon the Supreme Court to issue writs of mandamus (see Marbury *vs.* Madison, *supra*), it would be necessary to commence the action in the courts of the District of Columbia. It has been settled since the decision of Kendall *vs.* United States, *supra,* that those courts have jurisdiction to issue the writ of mandamus as an original proceeding. From the decision there an appeal can be taken to the Supreme Court of the United States.

It may be urged that, even conceding the jurisdiction of the courts in a proper case, there is no duty on Congress at the present time, for the reason that the applications from the various State Legislatures have not been simultaneous, but have extended over a period of years. There is nothing in the Constitution, however, providing that the applications must be made simultaneously or within a certain period of time. That being so, it is not perceived how either Congress or any other body can place a limit thereon. The very nature of the case would seem to demonstrate the falsity of the proposition that this is necessary. The United States is a nation. The desire for a change in the fundamental instrument of government may be, and in most cases is, of slow growth. The conditions making necessary a change may be felt in one portion of the country many years before they are forced home to the people of a different section. Because it takes a number of years to reach such an agreement, it can hardly be urged that the duty of Congress to respond thereto is thereby abated. Such a proposition seems too obviously fallacious to require extended discussion. The error of the proposition is equally shown in another way. Though the Legislature of a State should make application to Congress to call a convention, it is clearly competent for it to withdraw the same at any time before the Legislatures of two-thirds of the States have applied, should it change its mind in regard to the

necessity therefor. In other words, an application made to Congress and not withdrawn presents a *continuing* request or application. When there are before Congress unwithdrawn applications from the Legislatures of two-thirds of the States, their effect, therefore, is the same as if they had all been presented concurrently.

Another question that may be raised is, How extensive would be the authority to propose amendments of a convention called pursuant to this provision? The answer would seem clearly to be that there are no limits. The Constitution imposes none. On the contrary, it confers the most general authority upon the convention. "The Congress . . . shall propose amendments to this Constitution or . . . shall call a convention for proposing amendments." The extent, number or nature of the amendments which Congress may propose is not limited in any manner; no more is the authority of the convention limited. The Legislatures are not required to specify in any particular what amendments are desired. It would seem clear, therefore, that the convention may propose as many amendments and of whatever nature as it may see fit. It is to be borne in mind, however, that all the convention can do is to propose amendments; they acquire no validity until ratified by three-fourths of the States.

While the matter of securing direct election of Senators is probably more important, there are several others which will almost certainly receive the attention of the convention. One which should be considered is the advisability of providing that, in the future, a constitutional convention shall be called upon the application of less than two-thirds of the States. The Constitution must be essentially a stable instrument—sufficiently stable that it will not be changed by merely passing ideas. But since it operates not only as a grant, but as a limitation of the powers of the Government, it must not be so rigid that it cannot be altered to meet the needs of the times, as new and different conditions affecting the national life arise. The Constitution must be above light and whimsical changes, but it must not be so rigid and unyielding that it cannot be moulded to fit the conditions under which the nation actually exists. If it is, it is almost certain to be, not a guaranty of liberty and advancement, but a hindrance to progress, and it may eventually become an instrument of oppression. When a large

majority of the people are convinced that the best interests of the nation require a certain change in the Constitution, it should not be within the power of a small minority to block their action. The two requirements of a Constitution just mentioned are of equal importance. The framers of the Constitution recognized this fact, and while making ample provision for the stability of that instrument they also provided a direct means by which it could be amended in response to the voice of the people. At the time of the adoption of the Constitution there were but thirteen States. The concurrence of two-thirds of them was not a matter of very great difficulty. But in the hundred and twenty-three years since the Constitution was framed the country has grown enormously, probably beyond the fondest dreams of any man then living. To-day there are forty-six States. To secure the concurrence of two-thirds of the States, which was a matter of comparative simplicity then, has become one of the greatest difficulty. It would seem that it might be well to amend Article V of the Constitution to provide that whenever one-half of the States concur in applying therefor a constitutional convention shall be called.

The stability of the Constitution is amply guaranteed. The extreme difficulty of securing the concurrence of three-fourths of the States on any proposed change itself insures that no amendment will be adopted without careful and critical analysis. The danger to-day, as our social, industrial and governmental activities are becoming more and more complex, is that the Constitution will become too far removed from the people, and through its unelasticity and the extreme difficulty of changing it to meet the conditions under which the people actually live will become a hindrance to those advances which are essential to the common good.

Another matter which many feel requires consideration is the power of the Federal Government to regulate corporations or monopolies in whatever form. New economic conditions within the past half-century have caused, or permitted, the growth of great corporations which have obtained in many instances practical control of many of the necessities of life. Operating through numerous, if not indeed through all the States, no single State can control or even adequately regulate them. The monopoly thus affected is not necessarily injurious. The elimination of competition which most of them effect is an elimination of waste and

makes possible cheaper production. The difficulty lies in this: without adequate governmental regulation such corporations, while lessening the cost of production, are able at the same time, through gaining a monopoly on the necessities of life, to increase the price with no limit except "what the tariff will bear." We are gradually coming to realize two basic truths: First, that at least in the great industries of the nation, competition is wasteful and destructive, and that even if it were desirable, it is practically impossible to legislate against such a basic economic principle; second, that monopoly without real (as distinguished from merely nominal) regulation and control means a great increase in the cost to the consumer, and at the same time the amassing of private fortunes so enormous that they are a grave menace to society. This measure of regulation must be secured, and secured promptly. It can probably be done only by extending somewhat the powers of the Federal Government. If this be true, then such extension must be made at the earliest possible moment.

These questions, with perhaps some others, will undoubtedly receive the fullest consideration from the convention. The strongest and ablest men in the nation should and probably will be selected by their respective States as delegates to the convention. The gathering of a considerable number of such men, with the careful consideration of basic principles and mutual exchange of ideas which will result, can scarcely fail to be productive of much good.

No attempt was made in the Constitution to provide the rules by which the convention should be governed. As appears from the proceedings of the original Constitutional Convention already quoted, this was intentionally left to be determined by the subsequent conventions themselves. Nor is any provision made as to the representation of the several States. Following the precedent of the original convention, however, as well as from the very nature of the body as being a convention of the several States, it is indisputable that all are entitled to an equal voice therein. Whether the votes shall be taken by States, as in the original convention, or, the States being equally represented, by individual members, is a matter which it would seem competent for the convention itself to decide.

To show that by the action of a few more States a constitutional convention can be secured, and that when the

requisite number of States apply an absolute duty is imposed on Congress to call the convention, which duty can be directly enforced if disregarded by that body, has been the chief purpose of this article. There are many other questions in connection with the general subject of the convention that merit discussion, but it would unduly extend this article to attempt to consider them here. It is to be hoped that during the coming year a sufficient number of States, through their Legislatures, will apply therefor to secure the early meeting of the first convention for considering the Constitution since the adoption of that instrument nearly a century and a quarter ago.

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